Filed 8/10/04 P. v. Robinson CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIE ROBINSON, Defendant and Appellant.	E035170 (Super.Ct.No. FVA010275) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Michael R. Libutti, Judge. Affirmed.

Neil Auwarter, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Jeffrey J. Koch, Deputy Senior Assistant Attorney General, and Robert M. Foster, Supervising Deputy Attorney General, for Plaintiff and Respondent.

Pursuant to a plea agreement, defendant pleaded guilty to two counts of negligently discharging a firearm (Pen. Code, § 246.3) (counts 4 and 5)[1] and, as to each count, admitted that he personally caused great bodily injury (§ 12022.7, subds. (a), (b)). In exchange, the remaining counts and enhancement allegations were dismissed, and defendant was promised a sentence range between 16 months and 10 years, with the court to consider the probation report and arguments by counsel before imposing sentence. Subsequently, the trial court sentenced defendant to 10 years in state prison as follows: one year four months on count 4, plus a consecutive five-year term for the great bodily injury enhancement (§ 12022.7, subd. (b)) attached to that count, and a consecutive eight months on count 5, plus a consecutive three-year term for the great bodily injury enhancement (§ 12022.7, subd. (a)) attached to count 5. Defendant's sole contention on appeal is that the trial court's imposition of a full three-year consecutive term for the second great bodily injury enhancement on count 5 (the subordinate count) violated section 1170.1, subdivision (a) and was unauthorized. We reject this contention and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

On September 18, 1998, defendant was working as a security guard at an apartment complex in Rialto. A group of men were in the parking lot of the complex drinking beer. The Rialto Police Department was dispatched, and the group was told to disburse from the parking lot. After the officers left the scene, defendant followed behind the group as they walked into the complex toward their apartments. Defendant became

---

[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The factual background is taken from the probation officer's report.

angry at Bladimir H. when he struck the side of defendant's patrol car with his hand. Defendant approached Bladimir and told him to stop; when Bladimir refused, defendant removed his handgun from his holster and pointed it at Bladimir's back. Bladimir's younger brother, Antonio H., was walking behind defendant and grabbed defendant. Defendant spun around, breaking free from Antonio's grasp, and fired two shots at Antonio. Bladimir fled, and defendant followed him. Defendant was struck in the head by a bottle thrown by an unknown subject. After defendant ran around to a hedge, defendant fired two shots at Bladimir, striking him in the right side. Bladimir suffered a transected spinal cord and was paralyzed from the chest down. Antonio suffered an injury to his left elbow and a broken ulna.

Defendant was charged with one count of mayhem (§ 203) (count 1) and two counts of assault with a deadly weapon (§ 245, subd. (a)(2)) (counts 2 and 3). As to each count, it was alleged that defendant personally used a firearm (§ 12022.5, subds. (a) & (d)); as to count 1, it was alleged that defendant intentionally discharged a firearm, causing great bodily injury or death (§ 12022.5, subd. (d)); as to count 2, it was alleged that defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)); and, as to count 3, it was alleged that defendant personally inflicted great bodily injury causing coma and paralysis (§ 12022.7, subd. (b)).

On February 11, 2003, after the People amended the information by interlineation to add two counts of negligently discharging a firearm (§ 246.3) (counts 4 and 5), defendant pleaded guilty to counts 4 and 5 and admitted the two great bodily injury enhancements. In exchange, the remaining charges and allegations were dismissed, and defendant was promised a sentence of "no less than 16 months" and "no more than ten years" in state prison.

During the taking of the plea, defendant indicated to the court that he understood the terms of his agreement; that he went over the plea form and agreement with his

attorney; that his attorney explained the plea form to him; that his initials and signature were on the plea form; that he waived his constitutional rights by pleading guilty; and that he understood those rights. The court did not orally ask defendant whether he waived his right to appeal, but defendant initialed the box on the plea form which stated, "I waive and give up any right to appeal from any motion I may have brought or could bring and from the conviction and judgment in my case since I am getting the benefit of my plea bargain." The court found that "defendant had read and understands the declaration and plea form, the nature of the charges, the consequences and punishment for the offense he is pleading guilty to; [and] that his constitutional rights have been knowingly, intelligently, freely, and voluntarily waived." The court also found that "defendant has personally entered his plea in open court; that it was freely, voluntarily, knowingly, and intelligently entered by the defendant; [and] that there is a factual basis for the plea . . . ."

At the March 25, 2003, sentencing hearing, after the trial court considered the probation report and arguments of counsel, the court sentenced defendant to a term of 10 years in state prison.

On January 22, 2004, defendant filed a notice of appeal challenging the sentence or other matters occurring after the plea. This court, in an order filed on January 16, 2004, permitted the late filing of the notice of appeal.

II

DISCUSSION

Defendant contends the trial court's imposition of a full three-year sentence on the great bodily injury enhancement attached to count 5 (the subordinate count) violated section 1170.1, subdivision (a) and was an unauthorized sentence. He also argues that neither waiver nor the certificate of probable cause requirement are applicable to bar correction of this unauthorized sentence. The People do not address the merits of

defendant's argument but instead respond that defendant is estopped from raising this issue because he received the benefit of his bargain and because he failed to obtain a certificate of probable cause.

A certificate of probable cause is a prerequisite to an appeal from a judgment on a plea of guilty or nolo contendere unless the appeal is based solely on grounds occurring after entry of the plea, which do not challenge its validity. (Cal. Rules of Court, rule 30(b)(1); see § 1237.5.) In determining whether the requirements of section 1237.5 apply with regard to the sentence imposed following a plea, our Supreme Court has directed that we are not to look to the timing of the events being appealed, but rather consider the substance of the appeal -- that is, what defendant is challenging. (*People v. Buttram* (2003) 30 Cal.4th 773, 781-782 (*Buttram*); *People v. Panizzon* (1996) 13 Cal.4th 68, 76 (*Panizzon*).)

In *Panizzon*, the Supreme Court held that where a defendant is sentenced in accordance with the terms of a plea bargain that provides for a specified sentence and then attempts to challenge that sentence on appeal, he or she must secure a certificate of probable cause. The court explained that since the defendant is "in fact challenging the very sentence to which he agreed as part of the plea," the challenge "attacks an integral part of the plea [and] is, in substance, a challenge to the validity of the plea, which requires compliance with the probable cause certificate requirements of section 1237.5 and rule 31(d)." (*Panizzon*, *supra*, 13 Cal.4th at p. 73.)

Here, defendant did not agree to a specified prison term as part of his plea bargain. The Supreme Court addressed this distinction in *Buttram*, in which the defendant pleaded guilty to felony drug charges in return for an agreed maximum sentence. The defendant then appealed the trial court's denial of diversion and imposition of the maximum term. (*Buttram, supra,* 30 Cal.4th at p. 776.) The Court of Appeal majority, relying on *People v. Hester* (2000) 22 Cal.4th 290 and *Panizzon*, *supra*, 13 Cal.4th 68, concluded that the

defendant, by appealing the sentence he agreed could be imposed, effectively attacked the validity of the plea. Accordingly, the appellate court determined that, in order to challenge an imposed sentence that fell within the negotiated maximum term, a probable cause certificate was required. (*Buttram*, at pp. 776-777.)

Our Supreme Court reversed, stating: "Unless it specifies otherwise, a plea agreement providing for a maximum sentence inherently reserves the parties' right to a sentencing proceeding in which (1) as occurred here, they may litigate the appropriate individualized sentence choice within the constraints of the bargain and the court's lawful discretion, and (2) appellate challenges otherwise available against the court's exercise of that discretion are retained. An appellate challenge to the exercise of the discretion reserved under the bargain is therefore a postplea sentencing matter extraneous to the plea agreement. Such a claim may rarely have merit, but it does not attack the validity of the plea. For that reason, a probable cause certificate is not required." (*Buttram*, *supra*, 30 Cal.4th at p. 777.)

The Supreme Court further observed: "The parties to a plea agreement are free to make any lawful bargain they choose, and the exact bargain they make affects whether a subsequent appeal, in substance, is an attack on the validity of the plea. When the parties negotiate a *maximum* sentence, they obviously mean something different than if they had bargained for a *specific* or *recommended* sentence. By agreeing only to a maximum sentence, the parties leave unresolved between themselves the appropriate sentence within the maximum. That issue is left to the normal sentencing discretion of the trial court, to be exercised in a separate proceeding." (*Buttram*, *supra*, 30 Cal.4th at p. 785.)

In the present matter, the parties did not agree to a specific sentence. Instead, the parties agreed that defendant would admit guilt to two counts of negligently discharging a firearm and admit the great bodily injury allegations attached to each count and face a maximum sentence of 10 years in exchange for dismissal of the remaining three counts

and enhancement allegations. Defendant acknowledged that he would receive "no less than 16 months" and "no more than ten years." Essentially, he agreed to a 10-year maximum lid. "'[W]hen the question of whether to impose the negotiated maximum is left to the court's discretion at an adversary hearing, an appeal challenging the court's exercise of that discretion is not, in substance, an attack on the validity of the plea.'" (*Buttram*, *supra*, 30 Cal.4th at p. 787.)

However, as defendant notes, this case is distinguishable from *Buttram*. In *Buttram*, the Supreme Court expressly noted that the defendant did not waive his appeal right as to sentencing: "Neither the written change-of-plea form initialed and signed by defendant, nor any plea terms discussed in open court, specified that defendant was affirmatively waiving his right to appeal any sentencing issue that might otherwise properly arise within the negotiated maximum." (*Buttram*, *supra*, 30 Cal.4th at pp. 777-778, fn. omitted.) Later the court noted that the defendant, by challenging the proper exercise of sentencing discretion within the agreed maximum term, "seeks only to raise issues reserved by the plea agreement, and as to which he did not expressly waive the right to appeal." (*Id*. at p. 787.) Finally, the court concluded, "absent contrary provisions in the plea agreement itself, a certificate of probable cause is not required to challenge the exercise of individualized sentencing discretion within an agreed maximum sentence." (*Id*. at p. 790.) Justice Baxter, who authored *Buttram*, wrote in a separate concurring opinion: "A prime reason why we conclude here that defendant Buttram may take his appeal without a certificate, and that the Court of Appeal must address it on the merits, is that Buttram's plea *is silent on the appealability* of the trial court's sentencing choice. [¶] Yet it is well settled that a plea bargain may include a waiver of the right to appeal." (*Id*. at p. 791 (conc. opn. of Baxter, J.).) Justice Baxter observed that if Buttram's bargain had included an express waiver of appeal, "an attempt to appeal the sentence notwithstanding the waiver would necessarily be an attack on an express term, and thus

on the *validity*, of the plea. [Citation.] A *certificate of probable cause* would therefore be necessary to make the appeal 'operative[]'. . . ." (*Id*. at p. 793.)

Defendant's situation is exactly the circumstance described in Justice Baxter's concurrence. Defendant negotiated an "open" plea agreement that provided only for a maximum sentence. Unlike *Buttram*, however, defendant waived his right to appeal his sentence. In view of this waiver, defendant's appeal is an attack on an express term of his plea and thus a challenge to its validity.

Nevertheless, defendant complains that he could not knowingly and intelligently waive the right to appeal "a sentencing error which had not yet occurred or even been comtemplated." We disagree. A defendant implicitly waives a sentencing error, for example a section 654 issue, by pleading guilty in return for a specified sentence. (See, e.g., *People v. Hester*, *supra*, 22 Cal.4th at p. 295.) Moreover, a claim that a defendant did not knowingly and intelligently waive a particular right also triggers the requirement of a certificate of probable cause. As Justice Baxter explained in his concurrence: "An attempt to appeal the *enforceability* of the *appellate waiver itself* (for example, on grounds that it was not knowing, voluntary, and intelligent, or had been induced by counsel's ineffective assistance) would not succeed in circumventing the *certificate* requirement. This is because, however important and meritorious such a challenge might be, it too would manifestly constitute an *attack on the plea's validity*, thus requiring a certificate in any event." (*Buttram*, *supra*, 30 Cal.4th at p. 793 (conc. opn. of Baxter, J.).) We also reject defendant's further contention his waiver of his appeal right is not effective because it is mere boilerplate. The waiver of the right to appeal in *Panizzon* also contained boilerplate language, and the Supreme Court held this waiver was valid and enforceable. (*Panizzon*, *supra*, 13 Cal.4th at p. 82 ["I also waive and give up my right to appeal the denial of any and all motions made and denied in my case"].)

We find that because defendant expressly waived his right to appeal, a certificate of probable cause was required in this case. (*Buttram*, *supra*, 30 Cal.4th at pp. 791-793.) Separately and alternatively, we find that defendant is estopped from asserting this sentencing error on appeal.

Once a party has sought or consented to an action by the court in excess of its jurisdiction, that party may be estopped from complaining of the irregularity. (*In re Griffin* (1967) 67 Cal.2d 343, 347-348.) In criminal cases, the potential loss of freedom to the defendant elevates the importance of any irregularity in sentencing. However, the burden on the already overwhelmed criminal justice system must be considered. If defendants are encouraged to appeal the very sentences to which they agree during plea negotiations, there will be little incentive for prosecutors to offer reduced sentences. The result will not only be a disservice to criminal defendants, it will also bring the wheels of the criminal justice system to a screeching halt. Notwithstanding judicial economy, defendants should not be allowed to "unfairly manipulate the system to obtain punishment far less than that called for by the statutes applicable to their conduct." (*People v. Ellis* (1987) 195 Cal.App.3d 334, 345 (*Ellis*).) Respect for the judicial system mandates that once a defendant has "received the benefit of [his] bargain[,] [he] should not be allowed to 'trifle with the courts' by attempting to better the bargain through the appellate process." (*People v. Nguyen* (1993) 13 Cal.App.4th 114, 123; see also *People v. Hester*, *supra*, 22 Cal.4th at p. 295.)

As a result of these policy considerations, courts are not inclined to find error in the imposition of a specified sentence included in a negotiated plea agreement. (*People v. Nguyen*, *supra*, 13 Cal.App.4th at p. 122 .) When a criminal defendant knowingly and intelligently waives the limiting provisions of a sentencing statute as part of a plea bargain and receives a substantial benefit in exchange for his plea, the defendant is deemed to have waived his objection to the sentence imposed pursuant to the plea

agreement. (*People v. Jones* (1989) 210 Cal.App.3d 124, 132-133 (*Jones*); *People v. Otterstein* (1987) 189 Cal.App.3d 1548, 1550-1552.)

In *Ellis*, the Court of Appeal held the defendant was estopped from challenging on appeal the validity of a federal bank robbery conviction where she admitted as part of a plea bargain that the prior conviction was a serious felony within the meaning of section 667. (*Ellis*, *supra*, 195 Cal.App.3d at p. 347.) The *Ellis* court drew a distinction between a lack of jurisdiction in the fundamental sense on the one hand and an act merely in excess of jurisdiction on the other. (*Id.* at p. 343; see *In re Griffin*, *supra*, 67 Cal.2d 343, 346-348.) The court noted: "'[J]urisdiction in the fundamental sense' (a complete absence of authority with respect to the subject of the dispute)" cannot be conferred by consent or estoppel. (*Ellis*, at p. 343, quoting *People v. Garrett* (1987) 192 Cal.App.3d 41, 49.) When the trial court merely acts "in excess of jurisdiction, i.e., beyond statutory authority," however, "consent or estoppel could supply jurisdiction for an act undertaken by the trial court merely in excess of its statutory power." (*Ellis*, at p. 343.)

Here, the matter was properly before the trial court. Thus, any purported error by the trial court in imposing the full three-year term on the second great bodily injury enhancement was an excess of statutory authority or an excess of jurisdiction rather than a lack of fundamental jurisdiction. (*Ellis*, *supra*, 195 Cal.App.3d at p. 343.) "Where a court is merely acting in excess of its jurisdiction, the defendant who agrees to such actions may be estopped later from challenging the court's actions on jurisdictional grounds." (*Jones*, *supra*, 210 Cal.App.3d 124, 136.)

Both *Jones* and *Ellis* rely on *In re Griffin*, *supra*, 67 Cal.2d 343, in which the Supreme Court said: "Whether [a defendant] shall be estopped depends on the importance of the irregularity not only to the parties but to the functioning of the courts and in some instances on other considerations of public policy. A litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to question it when

'[t]o hold otherwise would permit the parties to trifle with the courts.' [Citation.]" (*Id*. at p. 348.)

Defendant argues, however, that a criminal defendant is only bound by a plea bargain that gives effect to an unauthorized sentence when he is aware that the sentence will be unauthorized. Defendant is correct. In *People v. Velasquez* (1999) 69 Cal.App.4th 503, the court discussed three cases holding that the defendant had waived objections to unauthorized sentences by agreeing to the sentences in exchange for substantial benefits. (*Id*. at p. 506.) The court noted: "The common theme of these cases is that when the defendant knowingly, intelligently and expressly agrees to certain aspects of a proposed negotiated disposition, i.e., sentencing irregularities, to obtain overall benefits of a negotiated disposition, he is estopped to complain." (*Ibid*.)

In *Jones*, one of the cases discussed in *Velazquez*, the defendant agreed as part of his negotiated plea to a sentencing structure in excess of the court's jurisdiction. (*Jones*, *supra*, 210 Cal.App.3d 124, 133.) The Fifth District Court of Appeal affirmed the denial of Jones's motion to withdraw his guilty plea, where the trial court, pursuant to section 1170. 1, subdivision (a), would normally have been limited to imposition of one enhancement (for the same prior serious felony conviction) under Penal Code section 667, subdivision (a) as a component of the aggregate term. (*Jones*, at p. 137.) The court emphasized the fact that the trial court had explained the consequences of Jones's plea agreement, expressly warned Jones about the irregularity of his agreed sentence, and extracted a waiver of his right to appeal on the sentencing issue. (*Id*. at pp. 133-134.) The trial court had warned that "'[t]here is a question as to whether or not that [sentence structure] can or can't be done. But you are agreeing as a term and condition of this plea agreement that you will waive -- which means to give up -- your right to appeal that issue . . . .'" (*Id*. at p. 130.) The court held that the defendant had the right to waive the

section 1170.1, subdivision (a) prohibition against double use of an enhancement as long as he did so in a knowing and intelligent manner. (*Jones*, at pp. 133-134.)

When a defendant has not been expressly warned of the sentencing irregularity, courts have inferred a defendant's knowledge from his or her conduct. In *People v. Otterstein*, *supra*, 189 Cal.App.3d 1548, the Third District Court of Appeal held that the defendant waived objection because he knew of and acquiesced to the sentence irregularity as a plea bargain term. (*Id*. at pp. 1551-1552.) The court made its finding by inference from the fact that defense counsel filed a notice of appeal on the very same day that he stated that he had no legal objection to the judgment. (*Ibid*.) Again, in *Ellis* the defendant's knowledge of the irregularity was inferred. Pursuant to a negotiated plea, Ellis admitted a prior conviction in another state that did not qualify as a serious felony in California. In that case, the Court of Appeal found that the defendant's knowledge was implied from the fact that defense counsel had, prior to sentencing, filed a motion to strike the prior based in part on the error, then conceded that the admission was lawful. (*Ellis, supra,* 195 Cal.App.3d at p.337.) The court perceived "plausible tactical reasons supporting counsel's decisions." (*Id.* at p. 346, fn. 5.) The admissions set the stage for the agreed plea arrangement which reduced the defendant's maximum sentence by three years with a possible further five-year reduction. (*Id*. at pp. 346-347.)

In this instance, the record does not necessarily suggest that defendant knew of the sentencing error, i.e., the unauthorized imposition of a full three-year term on the second great bodily injury enhancement, to which he was agreeing. However, defendant agreeing to a 10-year maximum lid is strong evidence that he agreed to the fashioning of his sentence in this way in order to arrive at the stipulated sentence. Even if we assume defendant did not make a knowing and intelligent waiver of the limiting sentencing statute, defendant's lack of knowledge of the irregularity may not control. Even when a defendant agrees to a plea bargain without knowledge of a sentencing irregularity

included therein, he may nonetheless be estopped from avoiding the plea arrangement. (*People v. Beebe* (1989) 216 Cal.App.3d 927, 934-936.) The interests of the defendant in overcoming the error are balanced against the policy considerations which under the particular circumstances support the plea agreement. (*Ibid*.) Defendant agreed to a specific maximum confinement period of no more than 10 years. Defendant negotiated for a maximum confinement period, not the manner in which it was formulated. The same confinement period could have resulted from any number of sentencing formulations possible in light of the allegations. Hence, to now claim that the sentence is unauthorized amounts to "trifl[ing] with the courts . . . ." (*People v. Nguyen*, *supra*, 13 Cal.App.4th 114, 122-123.)

Although we do not condone negotiated pleas structured in disregard of statutory sentencing limitations, under the particular facts of this case we hold that defendant is estopped to complain of the sentence to which he agreed in exchange for the dismissal of more serious allegations against him. Defendant obtained a substantial benefit by virtue of his plea bargain. He avoided a mayhem conviction, two assault with a deadly weapon convictions, several personal gun-use enhancements, a personal discharge of a firearm causing great bodily injury or death enhancement, and a possible life term. Thus, defendant was able to benefit by receiving a sentence of at most 10 years without suffering a much greater conviction. Notably, he does not now seek to withdraw his plea but rather suggests that two years be stricken from his agreed-upon sentence.

"When a defendant maintains the trial court's sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain." (*People v. Couch* (1996) 48 Cal.App.4th 1053, 1057.) If defendant's argument were accepted, he would be subject to a maximum sentence of nine years eight months instead

of the 10 years he bargained for based on an imposition of consecutive three years on count 4, plus five years on the § 12022.7, subdivision (b) enhancement, and one-third the midterm on count 5 of eight months, plus one year on the § 12022.7, subdivision (a) enhancement (the nine year eight month sentence would have been an authorized sentence). Defendant, however, gained the benefit of his bargain when he successfully avoided more severe convictions. Accepting his argument now would only allow him to "trifle with the courts by attempting to better the bargain through the appellate process." (*People v. Hester*, *supra*, 22 Cal.4th at p. 295.) Considering the totality of circumstances surrounding defendant's plea and the policy considerations, we conclude that the integrity of the judicial process is not harmed by concluding that defendant is estopped from complaining of his negotiated sentence.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

KING
J.